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INITIAL STATEMENT OF REASONS

CALIFORNIA CODE OF REGULATIONS
TITLE 8: Division 1, Chapter 3.3, Article 1, Sections 354, 371.2, 373, 376.1, 386

Occupational Safety and Health Appeals Board

SUMMARY

The Occupational Safety and Health Appeals Board (Board) is charged with adjudicating appeals from citations issued by the Division of Occupational Safety and Health. Labor Code section 148.7 authorizes the Board to adopt rules of practice and procedure to fulfill its mandate. Labor Code section 6603 identifies some limitations on the rulemaking authority of the Appeals Board by identifying specific portions of the Government Code with which the Board's Rules of Practice and Procedure must be consistent. The Board has long had such rules, which it supplements and amends, as needed. Currently, the Board has identified five existing rules, which, as explained further below, require amendment.

Three proposed changes (to sections 371.2, 376.1 and 386) concern amendment of citations and appeals and any continuances that may be needed to accommodate those amendments. These changes maintain the Board's ability to avoid unnecessary continuances but allow for greater ability to amend administrative pleadings (citations and appeals) when such amendments do not cause prejudice to the opponent but are requested at or near the time of the hearing.

The proposed changes to section 354 affect who may appear as a party in lieu of an affected employee in the event of the death of the affected employee. These changes also allow both an affected employee and his or her union representative to be granted party status in a single appeal proceeding.

The proposed changes to section 373 establish a uniform, expedited procedure for cases wherein the employer has not abated the alleged violation, and the alleged violation is classified as Serious, Willful, Repeat, or any combination thereof.

These changes increase worker safety by creating a more rapid hearing process in particular cases. Moreover, the changes remove gamesmanship or outcomes based on technicalities rather than the merits of the alleged violation. These rules remove some limitations on the flexibility and authority of the ALJ to control the proceedings in a manner best suited to the unique needs of each case. This proposed rulemaking action:

• Is based on the following authority and reference: Labor Code Section 148.7, which states that the Appeals Board "acting as a whole, may adopt, amend or repeal rules of practice and procedure pertaining to hearing appeals and other matters falling within its jurisdiction."

• Is not inconsistent or incompatible with existing state regulations. This proposal is part of the Rules of Practice and Procedure for proceedings before the Occupational Safety and Health Appeals Board and is consistent with Article 8 of Chapter 4.5 of part 1 of Division 3 of Title 2, and Sections 11507, 11507.6, 11507.7, 11513, 11514, 11515 and 11516 of the Government Code as required by Labor Code section 6603.

• Is the least burdensome effective alternative. For some of these proposals, alternatives were not specifically considered, because the proposals are the result of consensus building and group drafting~~,~~ with stakeholder groups over the course of several years, as well as, in part, the result of a successful pilot project. For portions of the proposals where reasonable alternatives existed, the alternatives are addressed below. For the group-drafted proposals, the interested and participating groups include the Board and staff, the Division of Occupational Safety and Health, California Chamber of Commerce, California Professional Association of Specialty Contractors, California Rural Legal Assistance, State Building and Construction Trades Council of California, California Framing Contractors Association and Western Steel Counsel.

SPECIFIC PURPOSE OF THE PROPOSED REGULATORY ACTION

In this Initial Statement of Reasons, the Appeals Board sets forth for each proposed rule change, 10 the specific purpose of the proposed regulatory action, 2) the problem the board is addressing through the proposed change, 3)the rationale for the change, and 4) the anticipated benefits of the proposed changes.

Section 354. Party Status

The purpose of this proposed change is to allow a representative of a deceased affected employee to participate as a party in Board proceedings. The problem addressed is that current regulations allow an affected employee to participate but they are silent regarding who may participate in lieu of the affected employee, should the affected employee die prior to the hearing. This change specifies persons who may appear in lieu of a deceased affected employee.

The rationale for the change is that it is needed to fully implement the Labor Code. Labor Code section 6603 requires that affected employees be given the opportunity to appear as a party in Appeals Board proceedings. This proposed change allows that affected employee participation to survive the death of the affected employee but confers no additional rights on any party.

This proposed change also allows both an affected employee (living or deceased) and a union representative to participate in the same appeal. The union representative currently is afforded party status, but the rule does not allow both a union representative and the affected employee to appear in the same proceeding. By making this change, union representatives can continue to participate as parties, but there is no longer a competition between a union and its affected employee to be the first to file for party status. These changes do not affect who may request to participate as an intervener. Participating as an intervener can be limited in scope by order of the ALJ, but participation as a party entitles the participant to present relevant evidence and to cross-examine witnesses. These are participation activities that can be denied to an intervener. The

definitions of "affected employee" and "authorized employee representative" appear in section 347 and are unchanged by this proposed amendment.

The Board anticipates the benefit resulting from the proposed change to be that employee and union participation will increase. By removing procedural hurdles that are not required by the OSH Act, Unions and affected employees who want to participate can do so.

Alternatives considered did not have the effect of specifying who could be a representative but rather referred to the Probate Code and proceedings to determine the representative. This alternative was rejected, because such a rule could require the Appeals Board to delay its proceeding for an indeterminate period of time pending the designation of a probate representative.

371.2. Amendments

The purpose of this proposed change is to allow for amendment of a citation or an appeal at any time up to the time of submission of the matter, as long as the amendment does not cause prejudice to the opposing party. Requests for amendments that do cause prejudice shall be granted if they are made at least 20 days prior to the hearing and are still sufficiently related to the original citation or appeal in that they relate back to the original citation or appeal. shall be granted.

If an amendment does cause prejudice to the opposing party and is brought within the 20 days preceding the hearing, the ALJ may grant the amendment and continue the hearing if this action is necessary to cure the prejudice and if the party bringing the amendment request demonstrates that it has good cause for failing to request the amendment at least 20 days prior the hearing.

The problem addressed by this rule change is the recent interpretation of the current rule as prohibiting non-prejudicial amendments to citations or appeals merely because they are made within the 20 days preceding, or at, the hearing. The current rule does not require that all such amendment request be denied, as the language of the current rule preserves the ALJ's discretion to grant non-prejudicial amendments at hearing by relying on a subordinate clause, "unless otherwise ordered". The current rule does not acknowledge or specify that Government Code section 11507 applies here, nor does it incorporate the substance of Government Code section 11507. The change does acknowledge and incorporate the substance of section 11507 ~~so~~ and thereby requires that amendments will be considered at the Appeals Board as they are in other administrative proceedings.

The rationale for the rule change is that it is needed to conform Board practice to other administrative pleading rules, as articulated in *Stearns v. Fair Employment Practices Comm'n* , (1971) 6 Cal. 3d 205, which states that amendment of charging language in administrative accusations cannot be more restrictive than amendment allowances in civil actions. The considerations in the proposed rule that determine whether an amendment request will be allowed are the same as those considered by civil courts in determining whether to amend civil pleadings to conform to the proof.

The benefits which the Board anticipate by adopting this more specific rule, as developed with stakeholders, are a reduced number of dismissed citations containing minor pleading errors that did not cause confusion or prejudice to the employer. Also, employers who omit to include affirmative defenses in the appeal form may still raise them at the hearing as long as the Division is made aware such defenses exist and has had an opportunity to answer the claims. In sum, the

benefit is anticipated to be that more matters are resolved on the merits rather than on technical pleading errors.

Alternatives to this language were not considered because this language was developed with stakeholders in a series of working meetings in 2012. The Board believes this is the least burdensome alternative to achieving the statutory purpose of allowing amendments to citations in the same manner as allowed under the Administrative Procedures Act, because it allows for liberal amendment of citations and answers without violating the six month statute of limitations for issuing a citation. This proposal clarifies for the regulated community when and why amendment of a pleading is allowed.

Section 373(b) Expedited Abatement.

The purpose of this proposed change is to uniformly expedite certain types of appeals in order to mitigate the delay in abatement that can occur as a result of Rule 362, which allows for the automatic stay of abatement in every case.

The problem addressed is the small but meaningful number of cases wherein a hazardous condition remains unabated at a cited employer's workplace pending the resolution of the appeal. The Labor Code provides an employer the opportunity to challenge any citation, and the automatic stay rule (Title 8, section 362) exists to protect employers from the expense of implementing changes to its operations (i.e. abatement of an alleged violation) that ultimately are not required if the citation is successfully appealed. The automatic stay rule is a Board rule that preserves Board resources by not requiring adjudication of the merits of a stay in each case. Such a requirement would necessitate very different procedures and would require more resources than the Board currently has available. Most employers voluntarily abate, as ordered in a citation, because doing so allows for an abatement credit of a 50% reduction in the proposed penalty. This allowance is due to Director's regulations and is beyond the scope of the Appeals Board's rulemaking authority.

Alternatives to this rule were proposed by stakeholders, namely, repeal of the automatic stay provision. However, such alternative would not be less burdensome and equally effective. Rather, such would result in employers who contest the abatement ordered by the Division having no remedy to obtain a stay other than by seeking one from the superior court. This ~~which~~ is costly for employers and the Division, which must respond. Another alternative considered in principle was a shortened procedure for addressing requests by employers for a stay and the repeal of the automatic stay. This was not the least costly, effective alternative, as it would require two hearings in cases where abatement was contested. A compelling argument was also made that the merits of ordering a stay turn on whether the violation occurred, and so any procedure addressing the merits of a stay requires a hearing on the merits of the alleged violation. For purposes of allowing discovery by the parties, reaching the merits consumes approximately 120 days of time.

Reason this alternative was selected: Since the great majority of employers who appeal also voluntarily abate the cited condition, and since non-serious and regulatory violations pose less of a danger to employees, staying abatement in those cases but pushing forward the serious, willful or repeat cases wherein the employer has not voluntarily abated effectively isolates the meaningful contests of the abatement order. This greatly reduces (to 4-5 months maximum) the amount of time employees are potentially exposed to unabated, serious violations after the citation is issued. Also, during the pilot project, abatement occurred in the great majority of appeals that qualified for this expedited abatement project, resulting in only one actual hearing during five months of the

pilot project. Thus, the existence of the expedited abatement procedure motivates employers to abate even if they contest the underlying violation. This greatly increases the safety of workers in California but does so with the least impact on the regulated community and at the least cost to the Board.

The Board also considered adopting this regulation without sub-section (c)(4). Subsection (c)(4) allows any party or the Board to request even shorter processing times than those contained in the proposal in the rare case where, in the discretion of the ALJ, such shortened time is appropriate. The addition of this subsection retains the existing rule's flexibility to expedite a proceeding as needed and removes the possibility that all cases will wait 120 days after the appeal is docketed to be heard. Because the subsection maintains permissive shorter time periods, it has no additional cost to the Board. Thus, it is the least burdensome alternative for maintaining flexibility while requiring the expedited processing of identified types of cases. The rule has the benefit of informing the regulated community of the types of cases that will receive expedited processing.

The rationale for the proposed rule change is that in order to expedite a particular class of cases, a rule is required, and the current rule allowing for ad hoc expediting of cases does not inform the regulated community of the types of cases that will be expedited. Although the average appeal processing time can be reduced administratively, there is no current rule requiring expeditious processing of appeals where the employer contests the abatement ordered by the Division. A party may request expedited abatement, but that request is rarely made. The harm is that conditions remain unabated until the hearing occurs, even if the citation is ultimately established and the abatement order found to be valid. Even a ten month average processing time (as preferred by federal oversight reviewers) can leave dangerous conditions in place for workers.

The benefits of this regulatory addition are that serious, willful, and repeat violations, wherein abatement has not occurred, will be processed within 120 days of the filing of the appeal, and as proven by the pilot program undertaken by the Appeals Board in 2009, many employers will elect to voluntarily abate the condition during the pendency of the appeal to avoid the rapid processing of the case.

376.1(f). Continuance at hearing.

The purpose of this proposal is to give the Administrative Law Judge explicit authority to grant a continuance request made at the hearing, if good cause therefore is shown. The problem addressed is the limitation in the current rule allowing a continuance at hearing to be granted only for unforeseen emergencies, including but not limited to death or illness of a key person or non-appearance of a subpoenaed witness whose testimony is material to the outcome of the proceeding. Another provision, section 350.1, grants the ALJ the authority to make any order during a hearing necessary to fulfill the purposes of the Act. ALJs currently grant continuances under this authority even if the need therefore does not meet the requirements of existing subsection (f) or only becomes apparent at the hearing. The rationale for the addition is that it will remove any conflict between 350.1 and 376.1(f) that may restrict an ALJ from granting a continuance when needed to fully adjudicate the merits of an appeal.

Alternatives were not considered, because the addition of the term "good cause" was suggested during a stakeholder meeting and was met with no objection. The addition here is the least burdensome alternative that has the effect of supporting the ALJs ability to grant a continuance or not based on the needs of each case.

386(b). Amendment by administrative law judge after submission.

The purpose of the proposal is to allow the Appeals Board to amend citations or appeals after submission of the case for decision, if criteria in Government Code section 11516 are met. The problem addressed by this change is that the current regulation prohibits an ALJ from amending the issues in the appeal if, after notice of intent to amend the issues, a party establishes that prejudice, even if curable, will result from such amendment. This restriction is greater than the restrictions on amendments in both civil proceedings and in the Administrative Procedure Act (Govt. Code §11516). Since Labor Code section 6603 requires the Board's regulations to be consistent with Government Code section 11516, this proposal is necessary to conform the Board's post-submission amendment rule to the Government Code. The proposed change does not require that an ALJ grant a post-submission amendment or a continuance. The reason for the proposed change is that it is needed to remove barriers created by the current rule that impede the ALJ from deciding an appeal on the merits when doing so is appropriate under the circumstances.

No alternatives have been considered since this language is taken from the enabling legislation and was proposed by stakeholders during working group discussions. This selection is the least burdensome alternative in that it preserves the full discretion of the ALJ to propose and grant amendments as needed to fit the unique facts of each case, while increasing the number of cases decided on the merits. Not only Board resources, but resources of the parties, which include the Division of Occupational Safety and Health, are preserved by procedural rules that remove gamesmanship from the administrative process. The current rule allows a party to await the full presentation of evidence and then rely on the opponent's pleading error to prevail, rather than meet the charges or defenses with evidence. A procedural system that resolves matters on the merits will result in parties settling more cases, which reduces the litigation burden for all stakeholders.

DOCUMENTS RELIED UPON

No documents were relied upon in developing these proposed regulations.

DOCUMENTS INCORPORATED BY REFERENCE

None.

REASONABLE ALTERNATIVES THAT WOULD LESSEN ADVERSE IMPACT ON SMALL BUSINESS

No reasonable alternatives were identified by the Board, and no reasonable alternatives otherwise brought to the attention of the Board would lessen the impact on small businesses.

SPECIFIC TECHNOLOGY OR EQUIPMENT

These proposals will not mandate the use of specific technologies or equipment.

ECONOMIC IMPACT ASSESSMENT

Economic Impact Assessment per Government Code section 11346.3, subdivision (b):
For amendments to CalOSHA Appeals Board Rules of Practice and Procedure
Dated June 1, 2012

Action: The regulatory action amends the Rules of Practice and Procedure governing appeals of citations for alleged violations of the Occupational Safety and Health Act issued by the Division of Occupational Safety and Health. The proposed changes bring the procedure for amending citations and appeals into conformity with the Administrative Procedure Act and allow more continuances to be granted at the discretion of the Administrative Law Judge. The proposed changes require some cases where correction of the violative condition is disputed to be processed on an expedited basis.The changes also remove barriers to employee participation in appeal proceedings.

Impact: By statute, the Appeals Board is only authorized to enact rules of procedure and cannot alter, create or diminish substantive rights of those affected by the Occupational Safety and Health Act.

The Appeals Board has determined that the proposed regulatory action has no discernable impact on small or large businesses. The proposed rules will allow Administrative Law Judges to grant continuances, amend citations and appeals, and grant party status to employees when such orders serve to further the duty of the Appeals Board to reach a decision based solely on the merits of the alleged violation. Some appealed matters will be resolved more quickly as gamesmanship will be reduced by these proposed changes. Reducing the length of litigation will create financial savings to businesses of all sizes.

The proposed rules would also expedite certain appeals, pending verification by the employer that the alleged safety violation has been corrected. This expedited procedure does not adversely affect small or large businesses. It simply accelerates the appeal process. The rules will eliminate costs associated with protracted litigation, which should be beneficial for all businesses.

The amendments are not expected to have any direct impact on the creation or elimination of jobs within the State of California, because the amendments affect only procedural aspects of administrative hearing regarding Occupational Safety and Health citations.

The Appeals Board has determined that more cases will settle earlier and will require fewer resources from employers, because the amended rules remove technicalities and allow Administrative Law Judges to reach a decision about each citation based on merits alone.

The amendments directly benefit the health and welfare of California workers by reducing the time a dangerous condition remains unabated in the workplace under the proposed expedited abatement rule change. Additionally, by allowing either party to correct nonsubstantive errors in administrative pleadings, enforcement of the Occupational Safety and Health Act will be more effective.

ALTERNATIVES THAT WOULD AFFECT PRIVATE PERSONS

No reasonable alternatives have been identified by the Board or have otherwise been identified and brought to its attention that would be more effective in carrying out the purpose for which the action is proposed, would be as effective and less burdensome to affected private persons than the proposed action, or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.